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Recommended Citation

Henderson, Lynne, "Whose Nature? Practical Reason and Patriarchy" (1990). *Scholarly Works*. 868.
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WHOSE NATURE? PRACTICAL REASON AND PATRIARCHY

LYNNE HENDERSON*

I. INTRODUCTION

My comments on John Finnis's *Natural Law and Legal Reasoning*¹ grow out of my concern about the relationship of law to authoritarianism.² In this comment, I do not intend to go deeply into the relationship of law to authoritarianism but rather to sketch out the background of the argument. It seems to me that authoritarianism, properly understood, is of great relevance to a symposium on jurisprudence and legal reasoning, because at a minimum, authoritarianism overlaps with legality's ethic of rule-following and obedience to authority. Authoritarian attitudes about authority and morality also are relevant to the jurisprudential concern with the relation of law to morality. Finally, authoritarianism is of particular concern to feminists because one of the most effective authoritarian systems throughout history has been that of patriarchy.³

Even the work of Professor Finnis, with its obvious concern for human beings, contains authoritarian elements and perpetuates patriarchy by omitting the voices of those human beings who are female and by subordinating women to his vision of human good. For example, in the piece that is the catalyst for this commentary, Finnis privileges reason over desire, mind over body, and authority over cooperation; the privileging and dichotomizing of these elements of human experience produce a vision

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*Professor of Law, Indiana University—Bloomington. This essay is an expanded version of a presentation given at the Conference on Practical Applications of Jurisprudential Thought held at the Cleveland-Marshall College of Law. I am grateful to the sponsors of the Conference for the honor of inviting me to comment on the work of John Finnis and for their kind hospitality, and I thank my Cleveland-Marshall colleagues for their interest and support for this commentary. I also wish to thank the University of Texas and the Indiana University faculties for their helpful comments on presentations of "Authoritarianism and the Rule of Law"; the contributions were extremely useful to me in the development of this presentation. I thank John Finnis and David Luban for their thoughtful observations on the presentation and my colleague Lauren Robel for her comments on an earlier draft. Special thanks are due Paul Brest, whose suggestions and criticisms helped make this a better piece. No one but me is to blame for remaining errors or for my stubborn insistence on some of my points.

¹ Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990) [hereinafter Finnis, *Legal Reasoning*].

² Henderson, *Authoritarianism and the Rule of Law*, forthcoming 66 IND. L.J. (1991).

³ See M. FRENCH, BEYOND POWER 338-56 (1985); cf. A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983) (subordination and dominance of women in history of politics and political theory).

of the good that has justified patriarchal thought for centuries. Further, Finnis's argument for self-evident human goods fails to mention the so-called "feminine" goods of love, care, and responsibility in relationships. Finally, Finnis's vision of the goals of authority and the good can justify the subordination of women by ignoring their experiences and by requiring adherence to moral absolutes that embody a male vision of the good.

In this comment, I first state what authoritarianism means, particularly in the context of law. I then assert that authoritarianism can and does lead to evil uses of law, and many common jurisprudential arguments are facilitative of authoritarianism. I then argue that some of Finnis's work lends itself to authoritarianism. I do not, however, think that law must of necessity be authoritarian, and I conclude by examining scholarship that I believe exemplifies an anti-authoritarian or humanistic view of law.

II. WHAT AUTHORITARIANISM MEANS

There has been a growing concern with authoritarianism in American legal scholarship recently.⁴ But scholars who have spoken of authoritarianism in law often have tended to use the word to identify a variety of perceived abuses or perversions of law.⁵ For example, Joseph Vining uses the terms authoritarian and authoritarianism in his book *The Authoritative and the Authoritarian*⁶ to mean the state of affairs when the Rule of Law is ignored,⁷ or when governments are run by charismatic leaders,⁸ or when there are regimes of pure power or tyranny,⁹ or when the legal system is a "mindless" bureaucracy.¹⁰ Professor Vining appears to assume that law properly understood cannot be consistent with authoritarianism, arguing that the internal methods of common law legal practice and thought are antithetical to authoritarianism in law.¹¹ But my argument

⁴ See, e.g., Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988).

⁵ Among them, Lon Fuller. See *infra* text accompanying note 30.

⁶ J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN*, (1986).

⁷ This is at least implicit in his argument that legal process and method are authoritative, not authoritarian, and his portrayal of the authoritarian as being in part based on tyranny.

⁸ *Id.* at 157.

⁹ *Id.* at 157.

¹⁰ *Cf. id.* at 124 (argument for the "personification" of law for authoritative law).

¹¹ It may be too strong a claim to say Vining sees law, properly, as non-authoritarian, as he notes such things as "An authoritarian streak may be functional where action is in question . . .", *id.* at 72, and that passions must be controlled, making some authoritarianism necessary for law. *Id.* at 148. See *id.* at 27-40, 150-58 (arguing that common law method is the non-authoritarian approach to law). Vining dismisses democracy as nothing more than a "denial of authoritarianism," *id.* at 141, and treats legislative law as secondary to Supreme Court doctrine and method.

is that certain characteristics of thought about law lend themselves quite readily to authoritarian uses of law and that Vining's arguments omit consideration of how closely law and legal reasoning are linked to authoritarianism by his caricaturing of authoritarianism. Thus, it is important to understand what "authoritarian" and "authoritarianism" mean.

"Authoritarian" and "authoritarianism" do not of necessity mean right- or left-wing, "fascist" or "communist". Instead these words describe a continuum of relationships to and uses of authority, although Vining and others have treated "authority" and "authoritarianism" as dichotomous concepts. Authoritarianism may represent a formal process of obedience or a substantive and complex social and political phenomenon encompassing obedience, punishment, and oppression. "Authoritarian" in what I shall term the "formal" sense may refer to unquestioning obedience to authority or, as Hannah Arendt defined authoritarian, obedience to traditional authority out of an attitude of acceptance.¹² While a general notion of obedience to authority itself is not undesirable per se, but rather dependent on the goodness or badness of that authority, this attitude toward authority can create the conditions for substantive authoritarian political structures and personal epistemologies that have repeatedly proven to be threaten human dignity and freedom.

Authoritarianism in what I term the "substantive" sense combines an overriding concern for order and control and insistence on obedience to rules, authority, and power with absolute demands for conformity and a punishing, hostile attitude toward those who disobey or are different.¹³ The authoritarian attitude embodies a punitive and rigid approach to life and a suspicious and distrustful view of human nature. Moral absolutism is characteristic of authoritarianism; rules cannot be questioned, their authority is always good and right. Significant for the argument that substantive authoritarianism leads to oppression and willingness to punish others is that the literature on authoritarianism indicates authoritarians are singularly lacking in sympathy or empathy for human suffering.¹⁴ Authoritarianism in the substantive sense is frequently linked to xenophobic nationalism or ethnocentrism; in the United States and Europe, the authoritarian "syndrome" appears to correlate with racist, anti-Semitic, and patriarchal attitudes. On one view, authoritarianism allocates risk and suffering to those upon whom we project our own "negative identity"—our fears, our failings, our hatreds, our non-idealized selves.¹⁵ Authoritarian racism, for example, projects onto Black people

¹² Arendt, *What Was Authority?*, in NOMOS I: AUTHORITY 81, 82-83 (1959).

¹³ See, e.g., T.W. ADORNO, E. FRENKEL-BRUNSWICK, D. LEVINSON & N. SANFORD, *THE AUTHORITARIAN PERSONALITY*, (abr. ed. 1982) [hereinafter *THE AUTHORITARIAN PERSONALITY*]; H. KELMAN & V.L. HAMILTON, *CRIMES OF OBEDIENCE* (1989); A. PERLMUTTER, *MODERN AUTHORITARIANISM* (1981).

¹⁴ *THE AUTHORITARIAN PERSONALITY*, *supra* note 13 at 336-38; See also S. OLINER & P. OLINER, *THE ALTRUISTIC PERSONALITY* 174 (1988).

¹⁵ K. KARST, *BELONGING TO AMERICA* 23-27 (1989).

all traits regarded as negative by white culture;¹⁶ patriarchy projects onto women the "evils" of sexuality, bodiliness, emotion, and sin.¹⁷

A recent study suggests that authoritarian individuals may fall into two subgroups, rule authoritarians who emphasize obedience to rules and punishment for disobedience without necessarily identifying with law or legal rules, and role authoritarians, those who have introjected—taken as part of their identity—the authority of rules generally and those rules that define their role or place in the existing political and social structure.¹⁸ Rule authoritarians obey law and authority out of fear of punishment; role authoritarians obey out of a sense of moral duty. Because role authoritarians may be more attached to and identified with institutions and the rules supporting them, they may be even more willing to be active in oppressing those seen as deviant than rule authoritarians, who may feel no loyalty towards those institutions and rules. To the extent that role authoritarians are more likely to fall within groups with power, their potential for doing harm may be greater. Both rule and role authoritarians, however, seek predictability and control, are intolerant of difference, and obey authority unquestioningly, without exercising independent moral judgment.

The proclivity to obey can be benign as long as the authority and rules obeyed are benign, but it can be dangerous when part of a system of repression, intolerance, or evil rules. People who are taught to obey authority as constituted by existing social structures can easily engage in reproduction of repression of others without thinking that they are doing anything evil and harmful, and in fact can take pleasure in inflicting suffering on those defined as deviant or other.

Authoritarian systems may reach the extreme violence of totalitarian death camps and slavery or the less overtly violent but oppressive systems of apartheid, Jim Crow, and "internment" camps. The authoritarian structure of patriarchy, based on the characterization of women as not fully human and properly destined to be domestics, has an even longer dismal history as the justification for dehumanization of and violence toward women and for requiring women to submit to male authority.¹⁹

Law is often implicated in authoritarian structures, because it is frequently the legitimating device used to perpetuate them. Law is not only ordering relationships, allocating resources, or expressing aspirations, it is also a method of social control. While we celebrate the Rule of Law as a brake on oppression and tyranny, we tend to overlook its other side: The Rule of Law demands obedience to authorities constituted by law or

¹⁶ See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁷ See G. ALLPORT, *THE NATURE OF PREJUDICE* (rev'd ed. 1982); *THE Authoritarian PERSONALITY*, *supra* note 13; cf. N. NODDINGS, *WOMEN AND EVIL* 35-57 (1989) (describing historical attribution of sinfulness to females).

¹⁸ H. KELMAN & V.L. HAMILTON, *supra* note 13, at 278-306.

¹⁹ See M. FRENCH, *supra* note 3. S. RUDDICK, *MATERNAL THINKING: TOWARDS A POLITICS OF PEACE* 3-9 (1989), contains examples from philosophy, as does Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. L. EDUC. 3 (1988).

speaking through law. The agents and institutions of law have the power to compel obedience if it is not forthcoming and to punish those who disobey. This combination of obedience and punishment is most obvious in the criminal law, but it is by no means absent from other areas of law. For example, the power of contempt in civil cases can result in jailing of persons.²⁰ Courts have resorted to using state force to implement their decisions, as William Forbath has recently demonstrated in his study of the resort to force by courts to enforce labor injunctions.²¹ Furthermore, punishment includes harms other than direct inflictions of physical pain, discomfort, or threats of infliction of pain. Economic harms may also drastically affect people's lives. For example, money judgments in civil cases may include punitive damages, damages designed to "punish" the defendant. Even without punitive damages, money judgments can damage the defendant's economic status and, as a consequence, life and life prospects or damage the lives of the defendant's employees if the defendant is a business entity.²²

Because law is a major source of normative authority and a tool of social and political power, and because it is the primary instrument for the modern state to accomplish its objectives, it should seem obvious that it is always vulnerable to "capture" by authoritarianism. Indeed, law may always be authoritarian in a formal sense, because a major supposition of law is that people must accept it and obey it absent some extraordinary justification. Moreover, because of legality's ethic of rule-following, we can quickly fall into the trap of celebrating rules-in-themselves, taking a simplistic "positivist" position that "law is law", or becoming obsessed with the study of law-in-itself and for-itself, thereby losing any meaningful critique of the goodness or rightness of the law or rules.²³

A recurring jurisprudential preoccupation with the duty to obey law and with justifying the authority of law²⁴ emphasizes law's formally authoritarian nature while consistently overlooking or trivializing the link of formal to substantive authoritarianism. As Vining has observed, "any theory of law . . . contains an unstated and usually unexamined assumption that people will follow the law. If people don't follow the law, they

²⁰ Perhaps the most well-known recent case involved Dr. Elizabeth Morgan, a mother who was jailed for refusing to obey a court order to allow her former husband, also a physician, unsupervised visits with their daughter. The mother believed the father was sexually abusing her daughter; the court disbelieved the evidence of abuse and the father denied abusing the girl. See Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System*, 38 AM. U.L. REV. 491, 491-94 (1989).

²¹ Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111 (1989). See also Avery, *Images of Violence in Labor Jurisprudence*, 37 BUFFALO L. REV. 1 (1989); Gordon, *Law and Disorder*, 64 IND. L.J. 803 (1989).

²² "If defendant does not pay up, they will take her furniture, they will take her house, and sell it to satisfy the judgement. That is coercive." Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. L. REV. 195, 213 (1987).

²³ For a poignant expression of the dangers of this position by a German judge, see Panzer, *American Judges for Peace?* (draft, on file with author).

²⁴ For a recent example, see Soper, *Legal Theory and the Claim of Authority*, PHIL. & PUB. AFF. 209 (Summer 1989).

could be required to."²⁵ "Required to" are the operative words. The state, through law, can force people to obey its commands, usually without having to explain itself. Questions of substantive authoritarianism inevitably arise when coercion is at issue but become especially crucial whenever law validates and facilitates oppression and violence, either directly by using state actors or indirectly through tacit state approval of oppressive action by private actors.

The belief held by Lon Fuller and others that the Rule of Law protects us from substantive authoritarianism, or at least substantively authoritarian law, is misplaced. As Joseph Raz has noted, the Rule of Law is not of necessity the Rule of *Good* Law.²⁶ Rule of Law virtues can be consistent with evil legal systems, and certainly authoritarian systems can adhere to Rule of Law virtues. The history of the law of slavery and Jim Crow, together with the history of the internment camps for Japanese-Americans in the United States, provide all-too-real examples of a substantively authoritarian legal system in a country dedicated to the Rule of Law. Even the prime virtue of the Rule of Law—that all are bound by law—does not in any way dictate the *content* of law. Thus, although the Rule of Law may be a necessary safeguard against tyranny, it is not a sufficient one. Authoritarianism is not arbitrariness, whim, or caprice—it is unrelenting insistence on obedience to authority, punishment of those who disobey, and hatred of outgroups.

Before going farther, I want to stress that by observing that the Rule of Law does not protect us from authoritarianism, I am *not* claiming that the Rule of Law virtues do not have real value or are insignificant. In criticizing legality's ethic of rule-following, I am not claiming that rules are necessarily bad, or that rule-following is necessarily bad. I *do* argue that it is dangerous to treat rules as absolutes: just because something is a rule does not entail anything about its goodness or rightness, and even rules that appear to be good may have oppressive or dehumanizing effects that we should not and cannot ignore. As an example of the first point, the Supreme Court's new limitation on affirmative action through a rule of racial neutrality and color-blindness embodied in *Richmond v. Croson*'s²⁷ inclusion of whites as members of a suspect class, while in itself consistent with Rule of Law impartiality, legitimates the continuance of racial oppression in this country by ignoring social fact and history.²⁸ As an example of the second kind of rule, the first amendment's protection

²⁵ J. VINING, *supra* note 6, at 156.

²⁶ J. RAZ, *THE AUTHORITY OF LAW* 211-26 (1979).

²⁷ 109 S. Ct. 706 (1989).

²⁸ See former solicitor-general Charles Fried's response to a letter by legal scholars published in the *Yale Law Journal* that argued the Court did not outlaw affirmative action programs in *Croson: Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989). Fried argues that the Court declared affirmative action preferences unconstitutional. Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholar's Statement*, 99 YALE L.J. 155, 160 (1989).

of speech is a generally good rule, but the protection of violent pornography and racist hate speech under the rule that the content of speech cannot be regulated has the oppressive and authoritarian effect of silencing, dehumanizing, and terrifying its victims, as Mari Matsuda, Charles Lawrence, Catherine MacKinnon, and others have so effectively argued.²⁹

Anglo-American jurisprudential and legal literature on authoritarianism's relation to law has been somewhat sparse since the Hart-Fuller debate over whether the German legal system under the Nazi regime, one that was obviously authoritarian, oppressive, and evil, was indeed a legal system at all.³⁰ Yet two scholars have been concerned with the existence of legal authoritarianism throughout their work. Robert Cover's work explores the punitive side of authoritarianism in law, while Robin West's work has examined the side of unquestioning obedience to authority. Cover argued against law's justification for imposing violence and cruelty on human beings throughout his life, and urged judges and legal scholars to be aware of the possible tyranny of law.³¹ West's work frequently explores our tendency to authoritarian submissiveness and abdication of personal responsibility for moral choice through obedience to authority.³² While she often uses "authoritarian" to refer simply to deference to and obedience of authority, that is, in terms of "formal" authoritarianism, she also is concerned that arguments for obedience mistake authority for the good and thus create the conditions for substantive authoritarianism by encouraging uncritical obedience to law with oppressive results. I want to combine these two sides of the authoritarian coin to argue that authoritarian jurisprudence and decisionmaking models have both the elements of physical and emotional violence and the element of uncritical obedience to law.

²⁹ Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Lawrence, *If He Hollers, Let Him Go: Racist Hate Speech*, forthcoming 1990 DUKE L.J.; C. MACKINNON, *FEMINISM UNMODIFIED* 163-97 (1987); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589; Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified* (Book Review), 82 NW. U.L. REV. 352 (1988). See also S. SCHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990); Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

³⁰ Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

³¹ See R. COVER, *JUSTICE ACCUSED* (1975); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985). For full development of the concerns with authoritarianism of Cover and West, see *Authoritarianism and the Rule of Law*, *supra* note 2.

³² See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1987); West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); West, *Adjudication is not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 U. TENN. L. REV. 203 (1987).

III. JURISPRUDENCE AND AUTHORITARIANISM

Jurisprudential and legal scholars may promote authoritarian uses of law in the following ways: by stressing the value of unquestioning obedience to a rule or authority, by denying that there are multiple rules and authorities available to decide cases in any sophisticated legal system, by engaging in stereotypical reasoning, by embracing punitive, oppressive results, by justifying the status quo and hypostasizing power relationships, by emphasizing the need for predictability and control to the exclusion of other considerations, and by reflexively taking a punishing approach to disobedience. Professor Michelman has recently observed authoritarian strands in judicial decisionmaking that also reflect these characteristics.³³ Formally, judges may invoke deferential obedience to external authorities or rules. Substantively, judges may refuse to protect persons from the tyranny of oppressive laws or they may engage in hostile or stereotypical decisionmaking.³⁴

The usual jurisprudential suspect for authoritarian legal thinking has been positivism; because of positivism's concern with the "is" at the expense of the "ought", it is easy to see a relationship between exclusive concern with the internal, self-referential view of law, rule-following, deference to the commands of authorities, and passivity that can produce injustices and legitimate oppression. Even positivist scholars who maintain an external critique of law or deny that law is a self-enclosed, autonomous discipline can manifest strong authoritarian tendencies. For example, the work of Judge Richard Posner, who writes in a positivist mode and uses an external critique founded on economic theory, at times makes arguments that seem to be explicitly authoritarian. Posner's assertion that law is power and constrained revenge, his portrayal of disobedience to authority as deluded, together with his overall "celebration of authority"³⁵ in his *Law and Literature*³⁶ book, have been incisively criticised and termed authoritarian by a number of reviewers.³⁷ His argument that the judge's task in interpreting statutes is one of discerning the command of the authoritative legislature and following that command seem sharply at odds with his external critique of law from the standpoint of economic efficiency and self-proclaimed libertarianism.³⁸ But it is not the formally authoritarian obedience to command argument that sepa-

³³ Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

³⁴ *Id.* at 1496, 1501, 1518, 1522, 1524-25.

³⁵ The phrase is Robin West's. See West, *Law, Literature, and the Celebration of Authority* (Book Review), 83 NW. U.L. REV. 977, 981 (1989).

³⁶ R. Posner, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1987).

³⁷ See, e.g., White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014 (1989); Weisberg, *Entering With a Vengeance: Posner on Law and Literature* (Book Review), 41 STAN. L. REV. 1597 (1989); West, *Law, Literature, and the Celebration of Authority* (Book Review), 83 NW. U.L. REV. 977 (1989).

³⁸ Posner has made these arguments in several articles and in the *Law and Literature* book. A recent example can be found in Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

rates his work from other strands of legal thinking. Rather, it is that he is substantively authoritarian as well: his thought frequently manifests a social Darwinist approach to legal issues, an approach characteristic of many American right-wing authoritarian movements.³⁹ His vision of law and authority, when combined with his distrust of human nature, his singular lack of sympathy for human pain and suffering, at least as expressed in his caustic asides⁴⁰, and his laissez-faire 19th century economic approach, renders Posner's version of positivistic jurisprudence deeply authoritarian.

Positivism is not the only authoritarian culprit in legal scholarship, however. While natural law theory often is associated with revolutionary and humanitarian liberation movements, including the civil rights movement in the United States, natural law has a strong association with authoritarianism as well, both as a justificatory device for subordination of human beings and as a legitimating device for rigid and punitive legal systems. While the modern and elegant synthesis and development of natural law theories by John Finnis is initially appealing, because of his emphasis on human dignity and flourishing and his effort to reinvigorate notions of the good in law, his work, too, contains both formal and substantive authoritarian elements.

Finnis has argued subtly and creatively for many moral results we all may favor, and has brought his considerable intelligence to bear on the moral question presented by the horror of nuclear weapons with impressive arguments.⁴¹ A moral position that emphasizes human flourishing and calls for the abolition of nuclear weapons at first would appear to be anti-authoritarian and to come within the model of the human liberation strand of natural law. But on closer examination Finnis's work contains authoritarian components. It is formally authoritarian in its stress on the need for authority and in its insistence on moral absolutes. It is substantively authoritarian in its patriarchal conception of those moral absolutes and the good. Elements of authoritarianism can be found in his works *Natural Law and Natural Rights*⁴², *The Rights and Wrongs of Abortion*,⁴³ and *Natural Law and Legal Reasoning*.⁴⁴

³⁹ R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1964); S. LIPSETT, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 123-30, 169-73 (expanded ed. 1981).

⁴⁰ See reviews cited *supra* note 37 for criticisms of Posner's tone; see also, Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986) (battered wives may find the alternatives worse; "we ought to be wary about embracing a system in which government breaks up families to protect wives against themselves").

⁴¹ But see Mark Tushnet's contribution to this symposium, Tushnet, *A Critical Legal Studies Perspective*, 38 CLEV. ST. L. REV. 137(1990) (criticizing method and underlying assumptions in the nuclear weapons argument).

⁴² J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1989) [hereinafter J. FINNIS, *NATURAL LAW*].

⁴³ Finnis, *The Rights and Wrongs of Abortion* in M. COHEN, T. NAGEL, & T. SCANLON, eds. *THE RIGHTS AND WRONGS OF ABORTION* 85 (1974).

⁴⁴ Finnis, *Legal Reasoning*, *supra* note 1.

In *Natural Law and Natural Rights*, authority at times appears to be absolutely necessary, according to Finnis, to the functioning of human groups. In the book, he argues that in order for human groups to achieve any coordination in pursuing common goals, "there must be either unanimity or authority."⁴⁵ This is an extremely strong statement on the necessity of authority. The claim appears to be based on a particular view of humans as incapable of existing apart from authority systems: Cooperation without complete agreement for reasons of care or responsibility to others, for reasons of disinterest or disengagement, or under conditions of continuing dialogue about or experiment with what should or should not be done, admittedly "bounded" in some sense by cultural and/or linguistic "rules," does not seem to fit his either-unanimity-or-authority justification for authority or his subsequent arguments for deference to authority and law in his book and in his *Legal Reasoning* article.⁴⁶ "Working things out" in a creative manner, rather than deferring to authoritative rules or authority figures, does not appear to exist as an actual human possibility for Finnis. As a result, obedience to authority and formal authoritarianism appear to be essential to Finnis's thought.

To avoid the potential for substantive authoritarianism created by the conclusion that authority and obedience to authority are necessary to the functioning of human groups, Finnis would require authority to embody certain moral absolutes, or basic human goods. In this way, authority and the good become the same, and one must obey and follow the good authority, including law. By Finnis's definition, law is a form of authority to be directed to the common good,⁴⁷ and therefore law is good. Under this view, with very few exceptions, legal authority presumptively—almost tautologically—creates both a legal and moral duty to obey. Although Finnis does not altogether abandon the strong natural law claim that an unjust law is not a law, because he would allow disobedience to laws violating certain procedural requirements or that fail to conform to the moral standards of the common good, he limits the scope of that disobedience by invoking the asserted need for authority.⁴⁸ Even if the laws violating certain procedural requirements or that fail to conform to the moral standards of the common good, he limits the scope of that preserve the authority of law itself.⁴⁹ Accordingly, the formal authoritarian assumptions may make it impossible to avoid at least some substantive authoritarian uses or understandings of law.

⁴⁵ J. FINNIS, *NATURAL LAW*, *supra* note 42, at 232.

⁴⁶ *Id.*, at 245-290.

⁴⁷ Finnis, *Legal Reasoning*, *supra* note 1.

⁴⁸ *Id.*; see also J. FINNIS, *NATURAL LAW*, *supra* note 42, at 352-62.

⁴⁹ "So, if an unjust stipulation is, in fact, homogeneous with other laws in its formal source, in its reception by courts and officials, and in its common acceptance, the good citizen may (not always) be morally required to conform to that stipulation to the extent necessary to avoid weakening 'the law', the legal system (of rules, institutions, and dispositions) as a whole . . . the citizen, or official, may . . . have the diminished, collateral, and in an important sense extra-legal, obligation to obey [an unjust law]." *Id.* at 361-362.

A potential for substantive authoritarianism in the form of patriarchy lies in Finnis's definition of the common good that the law serves, as well as in the role of legal reasoning and authority in ensuring the common good. While it sounds counterintuitive to object to "human flourishing" as the goal for law, it is Finnis's *description* of "human flourishing" that is of concern: "Human flourishing" is described in terms of "the common good," and the common good is found in a list of moral absolutes, in turn derived from their asserted "self-evidence."⁵⁰ Human life is a basic human—and common—good. The other basic goods that Finnis has described generally are knowledge, friendship, excellence in work and play and mastery of nature, inner and outer harmony and peace, authenticity in the sense of congruence of self and behavior, and harmony with a "reality" that the world has a super-human source of meaning and value, or religious belief.⁵¹ These goods appear to reflect a particular and deeply gendered vision of the good: the basic elements of human flourishing listed appear to be those that would be "self-evident" to the rational white Western man with a full stomach and a decent education, whose emotional and physical needs are thoroughly met by something, we are not told what.

Finnis's vision is one that has omitted the virtues of love, care, and nurturance⁵² and that for centuries has rested on deductive logic to justify the oppression of human beings who happen to be female. First, a theory of human flourishing that does not take account of those responsible for a major part of basic human flourishing seems odd; it excludes the experience of many, if not most, women. The responsibility for day-to-day human flourishing has fallen on the shoulders of women throughout time, whether it be African women who perform 60-70 per cent of the agricultural work necessary to feed their families and tribes,⁵³ or many American working women who perform over half of the domestic chores and child-rearing in two career families and all the work in single parent families.⁵⁴ Second, humans do not flourish in isolation from one another; infants need nurturance and care to survive at all. Adults need nurturance and love as well as friendship. Third, lack of recognition for and the subordination of the emotional life in human experience promote the belief that the emotional realm is dangerous, negative, or "less," rather than being important to being fully human. The denigration of the emo-

⁵⁰ *Id.*; Finnis, *Legal Reasoning*, *supra* note 1, at 1-2.

⁵¹ Finnis, *Legal Reasoning*, *supra* note 1, at 2. This is a slightly different formulation than that given in *NATURAL LAW*.

⁵² Finnis has not claimed that his list was exclusive, only that it contains the minimal indicia of basic human goods. He has indicated in a personal communication that he did consider care and love to be goods important to human flourishing.

⁵³ Stroebel, *REVIEW ESSAY: AFRICAN WOMEN*, 8 *SIGNS* 109 (1982).

⁵⁴ See Belkin, *Bars to Equality of the Sexes Seen as Eroding, Slowly*, N.Y. Times, Aug. 20, 1989 at 1Y, cols. 1-2; *Poll Finds Women's Gains Have Been Taking Personal Toll*, N.Y. Times, Aug. 21, 1989, at 8Y, cols. 1-6; Dionne, *Struggle for Work and Family Fueling Women's Movement*, N.Y. Times, Aug. 22, 1989, at 1Y, cols. 1-2.

tional could also be used to justify marginalizing the moral experience of those to whom the life of the emotions has been assigned in this culture, namely women. The voices of those who have had the responsibility for these elements of human flourishing should be taken seriously in any account of the basic human goods. Without addressing these necessary parts of human flourishing and human goods, Finnis's attempted model of natural, self-evident truths seems incomplete and ignores a major strain of developing feminist ethical thought.⁵⁵ Further, a theory of goods that rests on their "apparent self-evidence" but denigrates the natural, the emotional, and the physical realm, thereby failing to account for the lived experiences of women, leaves out their experience, their "self-evidence." It continues the male model of morality that has been used to denigrate women, one that has barred women from full participation in human moral experience.⁵⁶

Within the context of human goods and the premise that law is to be dedicated to common goods, legal reasoning becomes "practical reasoning," which in turn is logical deduction from the premise of a basic human good to its realization. This view of legal reasoning (and presumably judicial reasoning) as "practical reasoning," while initially seeming flexible because Finnis recognizes that human goods can be realized in various cultural ways,⁵⁷ is actually sharply constrained by his argument that prohibits intentional interference with any "basic human good."⁵⁸ Legal thought is to be governed by a moral principle that forbids choosing to destroy or damage any of his basic goods in any of its embodiments. You can neither destroy nor damage a good as an ends or a means. The rigid insistence on logical deduction from the premise that it is immoral to choose against any of Finnis's "basic human goods" creates a closed system that can lead to decisional paralysis: The command to not intentionally damage a human good means that a moral choice such as affirming a friendship knowing that one must damage one's pursuit of knowledge—truth—or one's life goal is impossible because it involves intentionally damaging a basic human good. This would leave legal decisionmakers, and us, unable to move from the status quo in many instances, which in turn would allow the perpetuation of existing systems of dominance, authority, and hierarchy. But I also would argue that more serious problems arise in Finnis's treatment of conflicts among his identified human goods, as illustrated in John Makdisi's powerful contribution to this symposium in which he vividly and movingly describes the impact of Finnis's

⁵⁵ Sarah Ruddick's recent work grounding ethics in the practical experience of mothering is a superb example of an articulation of many women's moral experience, choice, and dilemmas. S. RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989). See also C. GILLIGAN, *IN A DIFFERENT VOICE* (1982); N. NODDINGS, *CARING* (1984).

⁵⁶ For a summary of opinions of male philosophers on woman's ability to engage in moral discourse and reason, see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEG. EDUC. 3, 23-25 (1988).

⁵⁷ See Finnis, *Legal Reasoning*, *supra* note 1 at 2; J. FINNIS, *NATURAL LAW*, *supra* note 42.

⁵⁸ See Finnis, *Legal Reasoning*, *supra* note 1, at 2; J. FINNIS, *NATURAL LAW*, *supra* note 42, at 118-25.

system in a situation of tragic human choice.⁵⁹ The "incommensurability thesis"—the argument that basic human goods are not hierarchically ranked but rather stand orthogonally to each other—,when combined with the prohibition against intentional damage to a basic human good, condemns a decisionmaker to immorality if one of the basic human goods has to suffer at the expense of another.⁶⁰

Finnis attempts to handle the problem of tragic choice by means of his definition of "intention." "Intending" to damage a basic human good is to have a purpose to damage the good. But it seems to me that asserting that "unintentional" damage does not "count" does not resolve the issue, unless one is allowed to deny pre-existing knowledge that harm to a basic good would occur as a result of a choice in favor of another good. For Finnis, mere knowledge that the good *will* be damaged if one follows a particular course of action is not "culpable." Yet knowing that a basic human good such as life will almost certainly be destroyed and choosing to pursue a course of action that will inevitably cause that damage are frequently the same cognitively, experientially, and consequentially as having a *purpose* to damage or destroy the good. Recognition of one's personal responsibility for the harm is not contingent on whether one "meant" the harm to happen in the sense of the harm being one's goal; one may still feel and hold oneself responsible.

Further difficulties and contradictions in the incommensurability and intent theses, as well as the patriarchal assumptions in the basic human goods, become quite apparent in Finnis' argument against abortion. Despite Finnis' general assertion that the basic goods he identifies stand orthogonally to each other, the incommensurability thesis does not apply to physical human life, which is hierarchically above all other goods. Neither incommensurability nor the prohibition on intentional choice to damage basic human goods applies when the issue is physical existence as the opposing human good.

As I understand his argument, Finnis would absolutely forbid a woman to choose against human life, which he has stated begins at conception, under any circumstance that does not directly threaten the woman's continuing physical existence. When the woman's life is at stake, the intentionality issue gets muddled. That is, the death of the fetus is not intended; the purpose of the abortion is to save a life, and the loss of the other life is either a side effect or offset by a good of equal weight. Otherwise, the choice is always against abortion. This argument not only results in the exclusion of women from participation in other common goods by virtue

⁵⁹ Makdisi, *Justification in the Killing of an Innocent Person*, 38 CLEV. ST. L. REV. 85 (1990).

⁶⁰ For a more thorough discussion and criticism of the incommensurability thesis, see David Luban's contribution to this symposium. Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65 (1990).

of requiring them to bear children,⁶¹ but also the deliberate choice to force women to bear children can entail the intentional choices to damage women's relationships and responsibilities to others—including their nurturing and caring for their existing children and relatives—, to force women to abandon their pursuit of knowledge and excellence in work or their pursuit of a life project, to require women to sacrifice self and authenticity, to forbid women to "master" nature's biological inevitabilities no matter what the circumstances of conception, and so on, seemingly in violation of Finnis's prohibition on intentional choice against a basic human good. These harms to basic human goods are not mere "side-effects", but rather are the reality of women's lives under conditions of forced childbearing and childraising. This virtual prohibition on abortion also, in terms of his essay on legal reasoning, constitutes an instance of imposing on all girls and women harms that one would not impose on one's self or one's friends for no other motive than differential feelings—that women do not count as much as men or the unborn. It is a choice to allocate the entire risk associated with the consequences of consensual and forced heterosexual intercourse to women. In Alison Jaggar's words, "oppression is the imposition of constraints; it suggests that the problem is not one of bad luck, ignorance or prejudice, but is caused rather by one group actively subordinating another group to its own interest."⁶² In the instance of forced childbearing, it is women who are pressed into service of others, whether it be abstract principles, the State, as was the case in Romania, fetuses/the unborn, or men.

There are other points contained in Finnis's argument against abortion that denigrate the full humanity of the unwillingly pregnant woman. Say a woman wants to be not-pregnant, she does not want or intend to kill. The death of the fetus is, then, a mere side effect; it was not intended as a means or an ends. My point is different from Judith Thompson's argument about the violinist,⁶³ because it has to do with the intent of the woman and her moral decisionmaking rather than questions of supererogatory actions. Under Finnis's model of intent, the woman would not have acted immorally, because she did not have the purpose to *kill* the fetus any more than the doctor who cuts through the womb of a pregnant woman to save her life has the purpose to kill the infant/fetus. Of course, under a consequentialist morality, a different model of mental intent, or a model that treats purpose and knowledge as equivalent, such as that

⁶¹ For a powerful description of women's attempt to become selves and to participate in the common goods associated with full autonomy and humanity, see Hirschman, *Bronte, Bloom and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 205-30 (1988).

⁶² A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 6 (1983).

⁶³ See Thompson, *A Defense of Abortion*, in *THE RIGHTS AND WRONGS OF ABORTION*, *supra* note 44, at 3.

used by the Model Penal Code in the definition of murder,⁶⁴ it would not matter: The woman's knowledge that the fetus will most certainly die if she performs procedure X on herself is the *same* as having the purpose to kill the fetus, and she would be culpable for the death.⁶⁵ That is not Finnis's answer. To avoid this problem Finnis argues in his essay on abortion that the doctrine of double effect requires that if the fetus is to die, the action causing the death must be aimed at saving the woman's physical life in order to justify the otherwise forbidden action.⁶⁶ In other words, if a "death-dealing deed" is to be justified, it must be "proportionate (say, saving someone's life) . . ."⁶⁷

Proportionality, for Finnis, excludes the female experience of what is proportional and what is not. For example, Finnis has written that the proportionality "consideration alone might well suffice to rule out abortions performed simply to remove the unwanted fetus from the body of women who conceived as a result of forcible rape."⁶⁸ In this statement, perhaps made with regret, that abortion in the instance of forcible rape would be impermissible under his theory, Finnis chooses to impose enormous suffering on women and to ignore their experience of rape. This reflects a patriarchal attitude to a women's experience. As West has noted,

[f]rom a subjective, female point of view, an abortion is an act of self defense . . . [but] from the point of view of 'masculine' subjectivity, an abortion cannot possibly be an act of self defense: the fetus is not one of Hobbes' 'relatively equal' natural men against whom we have the right to protect ourselves Self-defense doctrine . . . simply doesn't apply to such dependent and unequal 'aggressors', indeed the notion of aggression itself does not apply" in a moral discourse defined by male interpretations of morality.⁶⁹

⁶⁴ MODEL PENAL CODE E210.2 (1)(a) provides that a killing committed purposely or knowingly is murder. "Knowingly" includes an awareness that the conduct will almost certainly cause the prohibited result. MODEL PENAL CODE E2.02(2)(b)(ii). Section (1)(b) makes extreme recklessness killing murder. Recklessness requires an awareness, or knowledge, of the risk created by the defendant's conduct. See MODEL PENAL CODE E2.02(2)(c). Extreme indifference to human life recklessness is equivalent to purposeful or knowing homicide for the purposes of the Model Penal Code. See Commentary to Section 210.2, reprinted in J. KAPLAN & B. WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 306 (1986).

⁶⁵ That there are such procedures that do not involve third parties should be obvious. See also Kolata, *As New Tactic, Do it Yourself*, N.Y. Times, Oct. 23, 1989 at B12 cols.1-6 (discussion of self abortion methods being taught to women in reaction to concern about diminishing rights in the United States and in countries that prohibit abortion).

⁶⁶ Finnis, *supra* note 43, at 102-03.

⁶⁷ *Id.* at 103.

⁶⁸ *Id.*

⁶⁹ West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 69 (1987).

To denigrate the gender-specific, soul-murdering harm of what Robin West has termed "invasive pregnancy" which male theories of the good simply do not comprehend ignores the self evident truth, for many, if not most, women who have been raped. Especially in the case of rape—and by that I mean rapes that go on all the time, whether unreported or disbelieved, rapes committed by husbands and fathers and "lovers" and "friends" as well as strangers—the woman may lose her self and her soul if she is forced also to carry the fetus to term.⁷⁰ As a rape survivor who demanded DES, the morning after pill, from the moment I arrived at the emergency room, my concern was to be not-pregnant. My intent, my desire, my very being refused to accept the evil of an act that I have argued elsewhere is a kind of death.⁷¹ I was either pregnant or I wasn't, but my intent was to be in the state of non-pregnancy in order to preserve my soul and my self from obliteration. To be forced to live with the invasion of another being as a result of a terrorist act would have been an unendurable and undeserved punishment. The rapist would have taken control over my body and my life in the most concrete, tangible, material way possible. I would have hated the fetus and hated myself. There is no question, even today, that I would have resorted to any means to rid myself of the evil result of an evil act, up to and including risking my own death. To speak of the "innocence" of a biological side-effect of a horrible crime is, to me, nonsensical. The very thought of the enslavement of my body and mind by a foreign, invasive, unwanted being fills me with revulsion and loathing.

If the argument from a woman's point of view of the harm in rape and a resulting pregnancy is insufficient under the doctrine of double effect, it is clear that the moral world of women is excluded from the realm of the moral altogether. The vision which Finnis argues for fails to take account of women as moral decisionmakers in the context of their self-evidences. Such denial of women's experience, with the accompanying pain and torment, is oppressive in the extreme.

Faced with a feminist self-defense argument, an argument that in Finnis's terms would constitute a proportional balance of one self's becoming against another self's becoming, Finnis could argue against abortion using the second part of his moral content of legal reasoning, the Golden Rule, do unto others as you would have them do unto you. According to this reasoning, a woman could violate the "Golden Rule" by failing to take the fetus's life into account. First, without listening to women's voices, it is impossible to say that women do *not* take the life of the fetus into account.⁷² Second, on Finnis's account, "Golden Rule" analysis is not

⁷⁰ See Olsen, *Comment: Unraveling Compromise*, 103 HARV. L. REV. 105, 124-25 (1989); West, *Marital Rape and Theories of Equality*, 42 U. FLA. L. REV. — (1990); Estrich, *Rape*, 96 YALE L.J. 1087 (1986); Henderson, *Review Essay, What Makes Rape a Crime?* (Book Review), 3 BERKELEY WOMEN'S L.J. 193 (1987).

⁷¹ Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193 (1987).

⁷² Feminist authors have made this point numerous times, and Fran Olsen also notes that prohibiting abortion automatically "denigrates women as moral decisionmakers." *Unravelling Compromise*, *supra* note 54 at 121. See Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019 (1984); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1629-30 & n.356.

a "rational" analysis, that is, conflicts under the Golden Rule cannot be rationally commensurated or resolved. This of course does not mean "irrational" choice; it only means that logical deduction from premises does not apply to such decisions. Even so, a woman could try to put herself in the potential child's shoes and decide that, given the circumstances of the potential child's life, the child would not want to be born given the pain and suffering the child would have to endure. This seems most obvious in the case of a severely damaged fetus, but it might also apply to other cases. A woman could identify with the reality of being unwanted and determine that if she were the fetus, she would choose not to be born and would choose abortion.⁷³ Indeed, she could weigh all the options, including adoption, and determine that adoption is not the best thing, as in the case of a severely handicapped infant, or because of the circumstances of the fetus's conception. She could also decide adoption is not desirable, based on her own experience or knowledge of others' experiences as abused adoptees or orphans, taking into account the risk of such a thing occurring. This is a moral decision that uses guidelines of concern and care for pain and suffering.

The absence of women's moral considerations in the abortion context from Finnis's work is telling: women must be either just like men in moral decisionmaking or their experience, *their* moral self-evidences do not count. Patriarchy is an authoritarian system, one of oppression and subordination of human beings who happen to be female, and Finnis's argument is one that justifies and supports the conditions of patriarchy by denying women choice over their reproductive capacity. Half of humanity could be denied pursuit of basic human goods and pressed into service to others under Finnis's view; half of humanity can be, and has been, denied full participation in the basic human goods and in the moral community by patriarchy because of biology.

IV. ALTERNATIVE JURISPRUDENCE

If rule-following, moral absolutes, and even obedience to authority present dangers of authoritarianism in legal thought, what are the alternatives? If moral absolutes are dangerous, are we left with only arguments for moral scepticism, for giving judges total discretion to impose their own values, or for taking a rebellious or nihilistic stance toward all law, all authority? Are we left with nothing but raw emotions and no moral guidance to determine what to do? It seems to me that such a portrayal of our alternatives not only is false⁷⁴, but also it strikes me as strangely

⁷³ A novel that explores the effects on a child born to a mother who tried to abort her, Marie Cardinale's *THE WORDS TO SAY IT*, suggests what the fetus/child/adult who is unwanted might go through. Although one can celebrate the fact that Cardinale's mother did not succeed in aborting her gifted daughter, one can also ask what of a child who does not have the support and resources Cardinale was able to have. M. CARDINALE, *THE WORDS TO SAY IT* (1983).

⁷⁴ Not to mention that such portrayals silence efforts to escape the existing paradigms. The threat of chaos can effectively end analysis. See R. ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF* 98-102, 220-24 (1989)(cultural anthropologist's response to same claims made by critics in social sciences).

fearful. These virtually preemptive claims against exploring alternative visions cling to orthodoxy and resignation, negating possibility and dialogue. Abandoning possibility and adopting resignation at the first accusation of nihilism would be extremely costly for those seeking to make law humane, responsive, and liberating rather than subordinating.

To be cautious about rules and to be cautious about authority does not mean one is an anarchist in the negative sense nor does it automatically render one a moral nihilist. Indeed, there are *at least* two alternatives to a jurisprudence of authoritarianism or a jurisprudence that justifies authoritarian decisions and results. The two alternatives are the jurisprudence of strong rights and principles and a developing feminist/humanitarian jurisprudence of understanding and care and responsibility for others. A third developing area of jurisprudence, that of people of color, draws on the insights of both rights and understanding and care,⁷⁵ and holds promise for an anti-authoritarian jurisprudence.

The two alternative positions somewhat resemble the competing models of moral development posited by Kohlberg and Gilligan,⁷⁶ but rather than seeing them as antagonistic, it is more useful and promising to view them as capable of combination.⁷⁷ The approaches are similar in that they are grounded in valuing human dignity, care, and resistance to cruelty, subordination, and repression. My choice of these alternatives to authoritarian legal thought is based on the fact that they are not only at least descriptively and theoretically inconsistent with authoritarianism, but also on the grounds that there is some empirical evidence that demonstrates the value of these approaches to resisting evil, authoritarian uses of law and power. Recent studies of attitudes to authority indicate that the anti-authoritarian orientation includes a sense of the dignity and rights of others, a sense of responsibility to others, an ethic of care, a capacity for empathy, compassion, and sympathy, and a sense of independence from conventional morality.⁷⁸ Tolerance of ambiguity and difference also characterizes the anti-authoritarian attitude, but this by no means entails inaction or passivity in the face of evil: rather, it is a refusal to engage in stereotyping of others, a resistance to us/them thinking, and an ability to place commonality rather than difference at the base of

⁷⁵ See, e.g., Lawrence, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989). For a feminist article in weaving together the ethic of rights and the ethic of care, see Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L. REV. 589 (1986).

⁷⁶ For a summary of the two different stages of moral development used by Kohlberg and Gilligan, see Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472 (1988); see also C. GILLIGAN, IN A DIFFERENT VOICE 24-63 (1982) (describing differences in moral reasoning).

⁷⁷ See Schneider, *supra* note 75, for a similar point.

⁷⁸ See KELMAN & HAMILTON, *supra* note 13, at 307-338; S. OLINER & P. OLINER, *supra* note 14, at 142-86, 209-22, 249-60.

relationship. Just as authoritarians are capable of doing good, anti-authoritarians are capable of evil, but their tendency toward inclusion, relationship, and care mitigates against tendencies toward exclusion, punishment, and oppression of those who are different or Other and able to resist intentional cruelty.

Much liberal/progressive legal and jurisprudential scholarship embodies the notion of strong rights and principles,⁷⁹ as does Roberto Unger's argument for "superliberalism" in *The Critical Legal Studies Movement*.⁸⁰ By "strong rights and principles" I am referring roughly to Ronald Dworkin's definitions in *Taking Rights Seriously*.⁸¹ That is, a strong right is a right such that it would be wrong to interfere with a person's exercise of that right; principles include the principles of fairness and equal concern and respect for each person. Strong rights are not solely those rights against the state, or aspects of "negative" liberty, but also can be the source of "positive" liberty.⁸² For example, Unger's "destabilization rights" are rights to take action to revise existing hierarchy; they are not simply rights to be left alone. The freedom of intimate association or the right to material resources necessary for a full existence are other such rights.⁸³ While there is an obvious correspondence among liberal tolerance and commitment to rights and anti-authoritarianism, I shall not focus on it here for several reasons. First, liberalism has its eloquent jurisprudential defenders who have made the case for rights, principles and tolerance forcefully. Second, the concern of liberal legalism often is with the abuses of power by state action and, accordingly, with negative liberty, rather than with abuses of power through state omission allowing groups to oppress others.⁸⁴ Finally, for all its strengths, liberal rights-based theory has failed to give dignity and full humanity to many people in this culture, including women and people of color.⁸⁵ Accordingly, I will

⁷⁹ There are a number of excellent examples of this strand of liberal legal scholarship discussed in West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (discussing work of Michelman, Tribe, and David Strauss, among others). See also RAZ, *THE MORALITY OF FREEDOM* (1986) and R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) as excellent examples in the jurisprudential literature.

⁸⁰ R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

⁸¹ R. DWORKIN, *supra* note 79 at 184-205.

⁸² The separation of "positive" and "negative" rights is usually attributed to Isaiah Berlin. See I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

⁸³ See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Michelman, *Foreword—On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

⁸⁴ There are, of course, exceptions in the work of many American constitutional theorists who subscribe to a notion of strong rights and principles.

⁸⁵ By saying this, I by no means wish to denigrate the importance of recognizing rights for those who have not had them. See, e.g., Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). My concern is closer to that of Unger's, that liberalism as presently practiced in Western democracies stops short of delivering on its promise. Moreover, while I think John Ely's observation that "most fundamental-rights theorists start edging towards the door when someone mentions jobs, food, or housing" is unfair, it certainly reflects the Supreme Court's decisions in this area. J. ELY, *DEMOCRACY AND DISTRUST* 59 & n.72; Henderson, *supra* note 72, at 1575 n.5 & 1650.

briefly discuss the other humanitarian alternative embodied in the scholarship of feminists, minorities, and humanitarians of every race and gender, with particular focus on that scholarship Mari Matsuda has called "outsider jurisprudence."⁸⁶ It is a jurisprudence that contests existing moral absolutes because they are based on androcentric, white Western European assumptions, assumptions that must be scrutinized in light of other voices.⁸⁷ I shall refer to it as the humanitarian vision of law.

Humanitarian scholarship does not make claims from transcendent moral truths or designated authority but rather from care and responsibility for the human condition. For many critical legal studies and feminist/minority scholars, the question in the instance of legal authority is always sceptical, because of an awareness of law's authoritarian tendencies and a knowledge that law's certainties have been a source of human misery. But they also recognize the *value* of law, as an empowering and facilitating human tool. For many of the humanitarian scholars, the starting question is: does this oppress, does this cause pain, does this deny someone full membership in the human community?, rather than what does legal or other authority command. Thus, these scholars seek to make law more liberating, more empowering, and less oppressive and painful by listening to the stories of the oppressed. They seek to alleviate that oppression by changing legal discourse, drawing on legal principles and doctrines, and challenging attitudes about the givenness of existing social and legal structures. They can do so by emphasizing rights as a means to recognize individual human dignity, but they do not stop there. They see human beings as capable of altruism as well as selfishness and summon us all to strive for human dignity and freedom from oppression in whatever guise.

A humanitarian vision is willing to entertain notions of different forms of goodness, as Patricia Williams has written. The humanitarian vision is one "where whole new worlds of meaning are allowed to coexist, and to contradict one another. In this happily cacophonous universe, white is white and white is good, and black is good and black is really black."⁸⁸ Existing on numerous levels of awareness, simulataneously,

⁸⁶ Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989).

⁸⁷ Examples of this rich and growing literature include K. KARST, *supra* note 15; Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987); Lawrence, *The Id, the Ego, and Equal Protection: Reconciling With Unconscious Racism*, 39 STAN. L. REV. (1987); Resnik, *On the Bias: Feminist Recon-siderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); and the works of West, Williams, Bender, Hirschman, cited in this comment.

⁸⁸ Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2143 (1989).

this perspective, the ambi-valent, multivalent way of seeing that is . . . at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary, that acknowledges that in certain circumstances I can be black and good and black and bad, and that I can also be black and white, male and female, yin and yang, love and hate.

Nothing is simple. Each day is a new labor.⁸⁹

Humanitarian jurisprudence can also be found in the work of a growing number of scholars seeking to validate notions of love, care, and responsiveness to human pain in legal decisionmaking.⁹⁰ These scholars seek substantive equality for victims of authoritarian hate and prejudice, and use historical and phenomenological arguments to criticize legally-created oppression, whether by omission or commission.⁹¹ The State is not necessarily the enemy, nor is positive law—it can be used to create a more humane and less oppressive world.⁹² This approach includes advocacy that the government *should* protect family members from “private violence”—either by arguing that the government should have been liable for the negligence of its workers in the *DeShaney*⁹³ child abuse case, or by insisting the government recognize the harms to, and take appropriate action to help, raped and battered spouses and children.⁹⁴ As Leslie Bender has written, it would include using tort law “in encouraging and improving our social relations, rather than reinforcing our divisions, disparities of power, and isolation” by reformulating a standard of care to be one of “acting responsibly towards others to avoid harm, with a concern about the human consequences of our acts or failure to act.”⁹⁵

Humanitarian legal scholarship also seeks a way to make sure that the benefits and burdens of being members of a community are truly equally shared and not used to the continuing subordination of a race, a

⁸⁹ *Id.* at 2151.

⁹⁰ See, e.g., Minow, *supra* note 87; Resnick, *supra* note 87; Henderson, *supra* note 72; West, *Economic Man, Literary Woman*, 39 MERCER L. REV. 867 (1987).

⁹¹ See, e.g., BELONGING TO AMERICA, *supra* note 15; *Looking to the Bottom*, *supra* note 75.

⁹² *Law's Republic*, *supra* note 4, at 1533-35, also makes this point in the context of civic republican/strong rights and principles scholarship.

⁹³ *DeShaney v. Winnebago Dep't of Soc. Services*, 109 S. Ct. 998 (1989) (holding that there is no right to “governmental aid” against “private violence”; state had no duty to protect abused son from his father even though state aware of the abuse). See also *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 167-77 (1989).

⁹⁴ See, e.g., Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23; *Marital Rape and Theories of Equality*, *supra* note 70; Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, forthcoming Stan. L. Rev. (copy on file with author);

⁹⁵ Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL ED. 3, 32 (1988).

group, or a gender. Examples include Catharine MacKinnon's redefinition of sex discrimination under Title VII to include a cause of action against the debilitating effects of sexual harassment in the workplace⁹⁶ and Charles Lawrence's and Mari Matsuda's challenge to the legal mind to find a way to limit racist hate speech within the framework of the first amendment that would be analogous to the limitations on defamation, obscenity, and other painful forms of speech that the first amendment does not absolutely protect.⁹⁷

For example, Matsuda makes use of the stories of the victims of racist hate speech and principles of basic humanity to critique our assumption that such speech should enjoy complete first amendment protection, arguing that such speech perpetuates racial oppression and fear. By unreflectively giving such speech complete protection, we are legitimating the authoritarian message of race hatred.⁹⁸ While Matsuda has argued that "[a] range of legal interventions, including the use of tort law and criminal law principles, is appropriate to combat racist hate speech,"⁹⁹ thus appearing in part to approve of authoritarian cures for authoritarian ills by way of criminal sanctions, a tort law that is restorative to the victim would seem more healing than damaging to humanitarian efforts.¹⁰⁰ At a minimum, it is important that law not blindly approve or legitimate racist oppression simply because it is "speech."

Similarly, MacKinnon has argued that the painful and degrading message of pornography constitutes sex discrimination and perpetuates hatred and violent oppression of women.¹⁰¹ The laws MacKinnon has proposed or seen (briefly) on the books used tort law precepts, rather than those of criminal law, which are at least not as punitive and authoritarian as criminal sanctions. While one can conclude that the ordinances she has proposed fail to account for pornography that is pleasurable rather than painful and thus deny women's experience,¹⁰² among other things,

⁹⁶ C. Mackinnon, *Sexual Harassment in the Workplace* (1979); C. Mackinnon, *Feminism Unmodified* (1981);

⁹⁷ Matsuda, *Public Response to Racist Hate Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Lawrence, *If He Hollers, Let Him Go: Racist Hate Speech*, 1990 DUKE L.J. .

⁹⁸ Matsuda, *Public Response to Racist Hate Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2380 (1989);

⁹⁹ *Id.* at 2360.

¹⁰⁰ There are other possibilities as well: A possible alternative that recognizes the pain Holocaust survivors would feel if Nazis marched through their town; at the least, do not require them to pay for the police protection of the marchers. Cf. *id.* at 2352-53.

¹⁰¹ C. MACKINNON, *FEMINISM UNMODIFIED*, 146-62 (1987); C. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 195-214 (1989); C. MACKINNON & A. DWORKIN, *PORNOGRAPHY & CIVIL RIGHTS* (1988); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

¹⁰² See West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L.J. 81, 116-39 (1987); West, *Pornography as a Legal Text in FOR ADULT USERS ONLY* 108, 123-29 (S. Gubar & J. Hoff, eds. (1989)).

to be aware of the propaganda and messages of objectification and non-humanness contained in much pornography¹⁰³ should give us pause if we are seeking to recognize women as full members of the human community. And, perhaps most important, MacKinnon's efforts *have* transformed the debate about pornography in legal scholarship and thought: the question of pornography no longer is portrayed as amusing, trivial, or unproblematic.¹⁰⁴

Finally, feminist scholars have examined the pain and oppressive consequences of unwanted pregnancy and have struggled to have women's voices and women's morality heard in the debate over abortion.¹⁰⁵ Feminists have repeatedly demonstrated that women are capable of moral choice, moral choice that may seem "immoral" by some patriarchal moral systems or absolutist standards, but which is deeply moral in the sense of responsibility and care in the complex particularity of any abortion decision. And many feminists and humanist scholars hope, undoubtedly correctly, that by ending poverty, cruelty, rape, and misogyny, all children will be wanted and abortion will be rare if it does not disappear altogether.¹⁰⁶

It is true that this all sounds good, but in practice this approach can be trashed as irreconcilable, "romantic", or an unprincipled grab-bag of notions.¹⁰⁷ Without rules to follow, another argument goes, you cannot choose to act morally; you will give way to evil passions or bias. This is a considerable leap from my rejection of moral absolutes, but perhaps such reactions are inevitable, as there is not one "system" of deduction, of narrow rationality, of doctrinal purity to fall back on. To say that opposing cruelty is a principle, caring is a principle, ending classification and domination of those we label Other is a principle seems hopelessly

¹⁰³ Given MacKinnon's definition of pornography in the Minneapolis ordinance as that which is "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes . . . women . . . presented in postures of sexual submission", C. MACKINNON & A. DWORKIN, *PORNOGRAPHY & CIVIL RIGHTS* 101 (1988), I can imagine pornography that has nothing to do with dehumanization, hatred, violence, or propaganda. But for a powerful description of the messages contained in pornography that demonstrates how dehumanizing and hurtful it can be, see Brest & Vandenburg *supra* note 29; *The Nature of Domination*, *supra* note 29.

¹⁰⁴ See Brest & Vandenburg, *supra* note 29; Robel, *Pornography and Existing Law*, in *FOR ADULT USERS ONLY*, *supra* note 101 at 178; Sunstein, *supra* note 29; Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989).

¹⁰⁵ See, e.g., sources cited in notes 61, 69 & 72, *supra*. See also Petchesky, *Introduction to Amicus Brief in Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S R.L. RPTR. 3, 4 (1986) (NARAL's amicus brief in *Thornburgh* "transforms the terms of abortion discourse . . . by concretely locating freedom of choice 'in the context of women's lives.'")

¹⁰⁶ N. NODDINGS, *supra* note 18 at 145-46, discusses this hope, but properly severs it from the issue of the morality of abortion itself.

¹⁰⁷ For a criticism of the use of stories, difference, empathy, and arguments of resistance to cruelty and human pain in legal decisionmaking, see Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

general, strange, and unbounded. There is no guidance in the impulse to help those in pain, according to the critic. But as Richard Rorty has recently observed, opposition to cruelty in "post modern" society is a realistic, intelligible, and vital ethical goal.¹⁰⁸ But the critic might ask, how will we make people behave morally and stop being beastly to each other if they don't have rules to obey?¹⁰⁹ Such a question, I would submit, simply reveals how authoritarian we all are, how embedded in authoritarian beliefs and practices legal and ethical thought is. People are not angels, but commanding them to be so and punishing them when they are not does not appear to have reduced human misery much and may have added to it by training us to be rigid, punitive, and intolerant of those who differ from us.¹¹⁰

Seeking new worlds, better worlds, a striving we have seen repeatedly in the last year in China, in Eastern Europe, and in a different way, in the reaction of the women's movement in the United States to the *Webster v. Reproductive Health Services*¹¹¹ decision cannot be ignored just because finding "the words to say it"¹¹² may be difficult, if not impossible, simply because we do not have all the answers. Sensitivity and care, perhaps, are better than pretensions to certainty as we move toward a vision also articulated by Mari Matsuda:

The feminist utopia looks something like this: It is a place without hierarchy, where children are nourished and told they are special, where gardens grow wheat and roses, too, where the desire to excel at the expense of another is thought odd, where love is possible, and where the ordinary tragedies of human life are cushioned by the care and concern of others.¹¹³

It is a world without authoritarianism.

¹⁰⁸ R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 141-98 (1989).

¹⁰⁹ The phrase is Mark Tushnet's and Joe Singer's. Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 514 (1986) (quoting Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 54 (1984)).

¹¹⁰ The original concern with authoritarianism and the authoritarian personality did arise from concern with anti-Semitism and Nazism in Germany, and the question of how a people capable of much creativity and beauty could perpetrate atrocities on others. For a psychoanalytic view of the authoritarian effect on children and adults, see A. MILLER, *FOR YOUR OWN GOOD* (1984).

¹¹¹ 109 S. Ct. 3040 (1989).

¹¹² THE WORDS TO SAY IT, *supra* note 73.

¹¹³ Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls's Theory of Justice*, 16 N. MEX. L. REV. 613, 622 (1986).